A

Pendakwa Raya lwn Chean Wei Chung

B MAHKAMAH TINGGI (TEMERLOH) — PERMOHONAN JENAYAH NO CB-43–3–11 TAHUN 2024
ROSLAN MAT NOR H
13 NOVEMBER 2024

C *Prosedur Jenayah — Jaminan — Pemberian jaminan — Hakim mahkamah sesyen membenarkan jaminan bagi pertuduhan di bawah s 39C Akta Dadah Berbahaya 1952 ('ADB') — Tujuan penggubalan s 41B ADB — Perbandingan s 39C ADB dan s 39A ADB — Sama ada perintah hakim mahkamah sesyen bertentangan dengan s 41B ADB — Sama ada pemakaian s 41B ADB mengatasi*
D *pemakaian s 388 Kanun Tatacara Jenayah — Sama ada perintah hakim mahkamah sesyen bercanggah dengan keputusan-keputusan mahkamah atasan — Akta Dadah Berbahaya 1952 ss 39A(2), 39C & 41B — Kanun Tatacara Jenayah s 388 & Jadual Pertama*

E *Tafsiran Statutori — Akta Tafsiran — Tujuan penggubalan s 41B Akta Dadah Berbahaya 1952 — Akta Tafsiran 1948 dan 1967 s 17A*

F Permohonan semakan jenayah semasa telah difailkan oleh pendakwa raya terhadap keputusan hakim mahkamah sesyen ('HMS') yang telah membenarkan jaminan kepada responden bagi pertuduhan di bawah s 39C Akta Dadah Berbahaya 1952 ('ADB') ('perintah HMS tersebut'). Berhubung dengan ini, pendakwa raya menyatakan bahawa perintah HMS tersebut adalah
G bercanggah dengan s 41B ADB manakala responden pula berhujah bahawa perintah HMS tersebut adalah tepat dan selari dengan keputusan dalam kes *Murugan a/l P Subramaniam v Public Prosecutor and another case* [2022] MLJU 2668 ('kes *Murugan*') yang memutuskan bahawa s 388 Kanun Tatacara Jenayah ('KTJ') terpakai dan memandangkan s 39C ADB telah diluluskan
H selepas daripada s 41B ADB, maka ia menyebabkan tertuduh layak mendapat jaminan. Berhubung dengan pemakaian kes Mahkamah Agong *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177 ('kes *Leong Ying Ming*') yang melibatkan kesalahan di bawah s 12(2) ADB yang boleh dihukum di bawah s 39A(2) ADB, responden berhujah bahawa terdapat perbezaan di antara
I s 39A(2) ADB dengan s 39C ADB kerana s 39C merupakan peruntukan peningkatan hukuman atau hukuman yang lebih berat dan bukannya satu kesalahan.

Diputuskan, mengenepikan perintah HMS tersebut:

(1) Sejajar dengan peruntukan di bawah s 17A Akta Tafsiran 1948 dan 1967, mahkamah telah meneliti tujuan penggubalan s 41B ADB tersebut berdasarkan Hansard bertarikh 10 Januari 1978 yang menjelaskan bahawa peruntukan tersebut terpakai kepada kesalahan-kesalahan yang diperuntukkan hukuman melebihi lima tahun. Berhubung dengan ini, Mahkamah Agong dalam kes *Leong Ying Ming* memutuskan bahawa memandangkan hukuman yang boleh dikenakan di bawah s 39A(2) ADB adalah pemenjaraan lebih daripada lima tahun maka s 41B ADB adalah terpakai. Oleh yang demikian, jaminan tidak boleh dibenarkan. Selain itu, dalam kes *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 ('kes *Chew Siew Luan*'), Mahkamah Persekutuan memutuskan bahawa pemakaian s 41B ADB adalah mengatasi pemakaian s 388 KTJ (lihat perenggan 8 & 10–14).

(2) Seksyen 39A dan 39C ADB bukannya peruntukan kesalahan tetapi adalah peruntukan hukuman. Ini bermakna pertimbangan dalam kes *Leong Ying Ming* tersebut adalah sama dengan kedudukan dalam kes semasa yang menyebabkan mahkamah terikat dengan keputusan Mahkamah Agong tersebut dan tidak dapat bersetuju dengan keputusan dalam kes *Murugan* (lihat perenggan 29–30).

(3) Hujahan yang menyatakan bahawa pada masa penggubalan s 41B ADB, s 39C masih belum wujud adalah tidak dapat disokong. Ini kerana apa-apa pindaan terhadap undang-undang yang menyentuh kepada sesuatu hukuman tidak wajar menyebabkan berlakunya perubahan kepada kedudukan undang-undang berkaitan dengan kategori kesalahan tersebut sama ada ia adalah boleh jamin (*bailable*), tidak boleh dijamin (*non-bailable*) dan tidak boleh dijamin sama sekali (*unbailable*) ('kategori-kategori tersebut'). Mahkamah berpendapat, adalah menjadi bidang kuasa pihak penggubal undang-undang untuk menentukan kesalahan-kesalahan yang tergolong di dalam kategori-kategori tersebut. Selain itu, penentuan bahawa sesuatu kesalahan tersebut adalah boleh jamin, tidak boleh jamin atau tidak boleh dijamin sama sekali telah diperturunkan di dalam Jadual Pertama KTJ (lihat perenggan 31–33).

(4) Sekiranya undang-undang memperuntukkan bahawa sesuatu kesalahan itu tidak boleh dijamin sama sekali (*unbailable*) ia akan dinyatakan di bawah undang-undang bertulis dan mahkamah yang mengendalikan kes tidak mempunyai budi bicara untuk memberikan jaminan kepada seseorang yang dituduh di bawah kesalahan yang tidak boleh dijamin sama sekali (*unbailable*). Jika ini dilakukan ia adalah satu kesilapan undang-undang yang perlu diperbetulkan (lihat perenggan 34).

(5) Adalah menjadi asas utama dalam sistem kehakiman untuk sentiasa mematuhi dan mengikuti keputusan mahkamah atasan berdasarkan kepada prinsip duluan kehakiman. Mahkamah berpendapat bahawa

keputusan HMS memberikan jaminan kepada responden adalah menyalahi s 41B ADB dan bertentangan dengan keputusan Mahkamah Agong dalam kes *Leong Ying Ming* dan keputusan Mahkamah Persekutuan dalam kes *Chew Siew Luan*. Ini adalah bertentangan dengan prinsip duluan kehakiman. Oleh yang demikian, ia adalah tidak sah di sisi undang-undang (lihat perenggan 15, 22, 25 & 35).

[English summary

The present criminal review application was filed by the public prosecutor against the decision of the sessions court judge ('the SCJ') who had granted bail to the respondent for a charge under s 39C of the Dangerous Drugs Act 1952 ('the DDA') ('the SCJ's order'). In this regard, the public prosecutor submitted that the SCJ's order was inconsistent with s 41B of the DDA while the respondent submitted that the SCJ's order was correct and in line with the decision in *Murugan a/l P Subramaniam v Public Prosecutor and another case* [2022] MLJU 2668 ('*Murugan*'s case') which held that s 388 of the Criminal Procedure Code ('the CPC') was applicable and since s 39C of the DDA was passed after s 41B of the DDA, it made the accused eligible for bail. In relation to the application of the Supreme Court's case of *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177 ('*Leong Ying Ming*'s case') which involved an offence under s 12(2) of the DDA which was punishable under s 39A(2) of the DDA, the respondent argued that there was a difference between s 39A(2) of the DDA and s 39C of the DDA because s 39C was an enhanced or more severe punishment provision and not an offence.

Held, setting aside the SCJ's order:

(1) In line with the provisions under s 17A of the Interpretation Acts 1948 and 1967, the court had examined the purpose of the enactment of s 41B of the DDA based on the Hansard dated 10 January 1978 which explained that the provision applied to offences for which a sentence of more than five years was provided. In this regard, the Supreme Court in the case of *Leong Ying Ming* held that since the sentence that could be imposed under s 39A(2) of the DDA was imprisonment for more than five years, s 41B of the DDA was applicable. Accordingly, bail could not be granted. In addition, in the case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 ('*Chew Siew Luan*'s case'), the Federal Court held that the application of s 41B of the DDA prevailed over the application of s 388 of the CPC (see paras 8 & 10–14).

(2) Sections 39A and 39C of the DDA were not offence provisions but were punishment provisions. This meant that the considerations in *Leong Ying Ming*'s case were similar to the position in the present case which caused the court to be bound by the decision of the Supreme Court and could not agree with the decision in *Murugan*'s case (see paras 29–30).

(3) The argument that at the time of the enactment of s 41B of the DDA, s 39C did not yet exist could not be supported. This was because any amendment to the law affecting a sentence did not necessarily result in a change in the legal position relating to the category of the offence whether it was bailable, non-bailable and unbailable ('the said categories'). The court was of the view that it was within the power of the legislator to determine the offences that fell into the said categories. In addition, the determination of whether an offence was bailable, non-bailable or unbailable had been set out in the First Schedule to the CPC (see paras 31–33).

(4) If the law provided that an offence was unbailable, it would be stated under the written law and the court dealing with the case had no discretion to grant bail to a person accused under an offence which was unbailable. If this was done, it was an error of law which ought to be corrected (see para 34).

(5) It was a fundamental principle of the judicial system to always comply with and follow the decisions of the superior courts based on the principle of judicial precedent. The court opined that the decision of the SCJ to grant bail to the respondent was contrary to s 41B of the DDA and contrary to the decision of the Supreme Court in the case of *Leong Ying Ming* and the decision of the Federal Court in the case of *Chew Siew Luan*. This was contrary to the principle of judicial precedent. Therefore, it was invalid in law (see paras 15, 22, 25 & 35).]

Kes-kes yang dirujuk

Bole v Horton (1673) Vaugh 360; (1673) 124 ER 1113 (dirujuk)
Cassell & Co Ltd v Broome [1972] AC 1027, HL (dirujuk)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, MP (dirujuk)
Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293; [2006] 1 CLJ 577, MP (diikut)
Jones v Randall and another (1774) 98 ER 954; (1774) 1 Cowp 37 (dirujuk)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, MP (diikut)
Mirehouse v Rennell (1833) 6 ER 1015, HL (dirujuk)
Murugan a/l P Subramaniam v PP and another case [2022] MLJU 2668; [2022] 1 LNS 2518, MT (dirujuk)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, MR (dirujuk)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276, MP (dirujuk)
PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ Rep 285, MP (diikut)
PP v Leong Ying Ming [1993] 1 MLJ 177; [1993] 2 CLJ 143, MA (diikut)
Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829; [1997] 3 CLJ 365, MP (dirujuk)
Young v Bristol Aeroplane Co Ltd [1944] KB 718, MR (diikut)

Undang-undang yang dirujuk

Akta Dadah Berbahaya 1952 ss 12(2), 15(1), 39A, 39A(2), 39B, 39C, 39C(1), 41B
Akta Tafsiran 1948 dan 1967 s 17A
Kanun Tatacara Jenayah ss 323, 388, Jadual Pertama

Intan Nor Hilwani bt Mat Rifin (Timbalan Pendakwa Raya, Jabatan Peguam Negara) bagi pihak pemohon.
Gan Hsien Yang (Ishvinderjeet Singh bersamanya) (Law Chambers of Hy Gan Kluang) bagi pihak responden.

Roslan Mat Nor H:

PENDAHULUAN

[1] Ini adalah satu permohonan semakan jenayah oleh pendakwa raya melalui surat yang dikemukakan kepada mahkamah bertarikh 7 November 2024. Ia berkaitan dengan keputusan hakim mahkamah sesyen yang telah membenarkan jaminan kepada responden bagi pertuduhan di bawah s 39C(1) Akta Dadah Berbahaya 1952 ('ADB').

[2] Bidang kuasa semakan telah dinyatakan di bawah s 323 Kanun Tatacara Jenayah ('KTJ') seperti berikut:

> 323 Powers to call for records of subordinate Courts
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> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
>
> (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.

[3] Setelah meneliti surat tersebut mahkamah ini berpendapat adalah wajar untuk meneliti kes ini bagi menentukan sama ada terdapat sebarang kesilapan, ketidakesahan atau kewajaran untuk semakan dilakukan dalam kes ini. Oleh itu mahkamah telah mendapatkan nota prosiding kes ini bagi melaksanakan tanggungjawab dan bidang kuasa semakan mahkamah ini.

[4] Timbalan pendakwa raya dalam suratnya menyatakan bahawa keputusan hakim mahkamah sesyen tersebut adalah bercanggah dengan peruntukan s 41B ADB 1952. Seksyen 41B ADB 1952 adalah seperti berikut:

> 41B No bail to be granted in respect of certain offences

(1) Bail shall not be granted to an accused person charged with an offence under this Act — A

(a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or B

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary. C

[5] Sebaliknya peguam responden berhujah di dalam hujahan bertulisnya bahawa keputusan hakim mahkamah sesyen itu adalah tepat. Ini bersandarkan kepada keputusan dalam kes *Murugan a/l P Subramaniam v Public Prosecutor and another case* [2022] MLJU 2668; [2022] 1 LNS 2518. Dalam kes tersebut Mahkamah Tinggi telah membenarkan permohonan jaminan bagi kesalahan di bawah s 39C ADB 1952 dan menyatakan alasan seperti berikut: D

[19] Thus, Murugan's right to bail is still intact and shall not be denied. It cannot be denied or taken away by s 41B which had existed way before s 39C came into force, unless specified so in s 39C DDA, or included in s 41B DDA. Without such a provision, the general law on bail as found in Chapter XXXVIIICPC, specifically s 388 CPC read together with the fifth column of the first schedule to the CPC applies. Reason for its absence is attributed to the fact, Parliament did not intend section 41B to be applicable to an offence under s 15(1)(a); 10(1)(b) as well as 31A DDA but punishable for an enhanced penalty under s 39C of the DDA. A penal provision taking away right of an accused to bail, has to be clear, precise and certain. If otherwise, benefit of doubt goes to the accused person, who is then entitled to bail. This syncs with art 5(1) of the FC which operates in favor of Murugan, so as not to allow his personal liberty to be further deprived. Liberty of the accused is a fundamental right guaranteed by art 5(1) of the FC. Thus, an interpretation of a statute that renders the fundamental right illusory has the effect of making that statute unconstitutional (see: *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697). Further, when there are two interpretations to a statute, one which is unconstitutional and the other constitutional, the latter interpretation would be preferred (see: *Kedar Nath Singh v State of Bihar* [1962] Supp (2) SCR 769). This approach is in keeping with the doctrine of presumption of constitutionality (see: *AG Gambia v Momodou Jobe* [1984] UKPC 10). In the same case the Privy Council held: E F G H

> A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction. I

[6] Mahkamah juga berpendapat dalam kes tersebut bahawa s 388 KTJ terpakai. Begitu juga mahkamah berpendapat bahawa disebabkan s 39C ADB

1952 telah diluluskan selepas daripada s 41B ADB 1952 maka ia menyebabkan tertuduh dalam kes tersebut layak untuk mendapat jaminan ketika menunggu perbicaraan. Ini dinyatakan seperti berikut:

> [17] As alluded to above, s 1B of the DDA has been in force long before s 39C of the DDA came into force. Pursuant to s 41B of the DDA, Murugan is only alleged to have committed a less serious offence under s 15(1)(a) of the DDA. That per se entitles him the right to bail pending trial. To reiterate, bail relates to the nature of offence, accused is alleged to have committed or charged with and not the punishment he has to suffer. Although the degree of punishment signifies seriousness of the offence allegedly committed by an accused, thus categorising it to be bailable or not bailable under the CPC or unbailable under s 41B of the DDA, it is not the only factor to determine bailability. Fortifying this argument is the opening words of s 41B of the DDA which reads as '(1) Bail shall not be granted to an accused person charged *with an offence* under this Act Following this, Murugan is charged only for committing an offence under s 15(1)(a) of the DDA *and not any of the catalogue of offences specified under s 41B of the DDA*'.

[7] Seksyen 41B telah diperkenalkan di dalam ADB 1952 pada 10 Mac 1978 melalui Akta Dadah Berbahaya (Pindaan) 1978 Akta A426.

[8] Sejajar dengan peruntukan di bawah s 17A Akta Tafsiran 1948 dan 1967 adalah wajar untuk Mahkamah ini meneliti apakah tujuan penggubalan s 41B ADB 1952 tersebut bagi memahami pemakaian yang sewajarnya bagi kes tersebut. Adakah ia terpakai kepada kesalahan-kesalahan yang diperuntukkan hukuman melebihi lima tahun selepas pindaan s 41B ADB 1952 atau sebaliknya.

[9] Seksyen 17A Akta Tafsiran memperuntukkan seperti berikut:

> 17A Regard to be had to the purpose of Act
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> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[10] Jika diteliti kepada Penyata Rasmi Parlimen (Hansard) bertarikh 10 Januari 1978 ketika Rang Undang-undang Dadah Berbahaya (Pindaan) No 4 dibentangkan untuk bacaan kali kedua telah diperjelaskan tujuan pindaan s 41B ADB 1952 diperkenalkan. Ia dapat dilihat melalui ucapan Datuk Seri Haji Hamzah bin Datuk Abu Samah di ms 6986 seperti berikut:

> Adalah didapati bahawa melepaskan seorang yang dituduh atas jaminan bagi sesuatu kesalahan di bawah Ordinan ini kerapkali menghampakan tujuan-tujuan pihak pendakwa kerana yang dituduh samada terus menjalankan dengan lebih giat lagi urusannya mengedarkan dadah berbahaya dengan tujuan untuk mendapatkan lebih banyak wang bagi melegakan kesan sabitan dan hukuman yang akan diterima,

atau, jika ia adalah seorang penagih, ia terus menghisap dadah sehingga ia tidak dapat dipulihkan bila perbicaraanya selesai. Oleh yang demikian adalah difikirkan bahawa dalam kes-kes yang boleh dikenakan hukuman mati atau penjara selama lebih daripada Iima tahun jaminan sekali-kali tidak diberi kepada seseorang yang dituduh, dan di dalam kes-kes yang lain jaminan tidaklah diberi jika Pendakwa Raya memperakui secara bertulis bahawa bukannya bagi kepentingan awam untuk membenarkannya dijamin. Justeru itu, adalah dicadangkan untuk memasukkan suatu Seksyen 41B baharu di dalam Ordinan itu sebagaimana yang dinyatakan dalam FasaI 6 Rang Undang-undang itu.

[11] Seterusnya isu berkenaan dengan pemakaian s 41B ADB 1952 ini telah dinyatakan oleh Mahkamah Agong dalam kes *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177; [1993] 2 CLJ 143. Dalam kes tersebut hakim mahkamah sesyen telah menolak permohonan jaminan oleh tertuduh yang dituduh atas kesalahan di bawah ADB 1952 yang diboleh dihukum di bawah s 39A(2) Akta yang sama. YAA Gunn Chit Tuan, Hakim Besar Malaya ketika itu menyatakan seperti berikut:

We have perused the notes of proceedings recorded in the court below and note that unfortunately the Federal Court case of *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285; [1982] CLJ 354 was not brought to the learned judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s 41B(1)(b) are clear and that the words 'punishable with imprisonment for more than five years' mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to s 39A(2), we consider that the words 'be punished with imprisonment for life or for a term which shall not be less than five years' are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, ie five years and one day up to a maximum of imprisonment for life. That being so, an offence under s 39A(2) of the Act clearly comes within the ban imposed by s 41B(1)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned judge should not have granted bail in this case.

[12] Adalah mustahak diberikan perhatian bahawa dalam kes tersebut di atas kesalahan yang dipertuduhkan boleh dihukum di bawah s 39A(2) Akta yang sama iaitu hukuman lebih berat berdasarkan kepada berat dadah yang terlibat seperti yang dinyatakan di bawah s 39A(2) ADB 1952. Namun Mahkamah Agong berpendapat disebabkan hukuman yang boleh dikenakan di bawah s 39A(2) ADB 1952 adalah pemenjaraan lebih daripada lima tahun maka s 41B ADB 1952 adalah terpakai. Ini bermakna jaminan tidak boleh dibenarkan.

[13] Pada masa yang sama mahkamah juga merujuk kepada kes *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ Rep 285. Dalam

kes tersebut isu yang timbul ialah adakah s 388 KTJ terpakai terhadap kesalahan s 39B ADB 1952 atau s 41B perlu diguna pakai. Dalam kes tersebut Mahkamah Persekutuan menyatakan melalui penghakiman YAA Raja Azlan Shah, Hakim Besar Malaya ketika itu menyatakan:

> The Dangerous Drugs Act 1952 (Revised 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the jurisdiction of Courts in respect of offences thereunder and their trial, and for purposes connected therewith. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that' s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 1978. Generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (see also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 at p 138; [1982] CLJ Rep 288 at p 291). The provisions of s 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.
>
> It would be erroneous to apply expressions used and provisions made in a statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must exnecessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe en passant that any other construction would result in nullifying the purport and effect of the provisions of 41B(1)(c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

[14] Ini bermakna sudah terang lagi bersuluh bahawa pemakaian s 41B ADB 1952 adalah mengatasi pemakaian s 388 KTJ yang dinyatakan oleh Mahkamah Persekutuan tersebut.

[15] Adalah menjadi asas utama dalam sistem kehakiman untuk sentiasa mematuhi dan mengikuti keputusan mahkamah atasan berdasarkan kepada prinsip duluan kehakiman. Sekiranya prinsip tersebut tidak diamalkan dan dipatuhi oleh mahkamah bawahan, ia akan menyebabkan sistem pentadbiran

keadilan akan kucar-kacir dan tiada kepastian berkenaan dengan kedudukan undang-undang. Hal ini telah diutarakan oleh Mahkamah Persekutuan dalam kes *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276 seperti berikut:

> It is however necessary to reaffirm the doctrine of stare decisis which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly.

[16] Ia juga turut dinyatakan dalam kes *Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829; [1997] 3 CLJ 365 setelah Mahkamah Persekutuan memetik kes *Cassell & Co Ltd v Broome* [1972] AC 1027 dengan menyatakan seperti berikut:

> In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, and the duty of the Court of Appeal to accept loyally the decisions of the House of Lords, and the chaotic consequences which would follow should the Court of Appeal fail in this duty, apply with full force, mutatis mutandis, to this country and we adopt what he said. Clearly, the Court of Appeal in *Harta Empat* flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles.

[17] Prinsip duluan kehakiman juga telah dinyatakan dengan jelas oleh Mahkamah Persekutuan dalam kes *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 seperti berikut:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

[18] Sebagai pelengkap kepada perbincangan berkaitan dengan duluan kehakiman adalah wajar sekiranya mahkamah menelusuri perkembangan prinsip duluan kehakiman. Dalam kes *Bole v Horton* (1673) Vaugh 360; (1673) 124 ER 1113 di perenggan 383 dinyatakan seperti berikut:

> [383] Yet if a Court give judgment judicially, another Court is not bound to give like judgment, unless it think that judgment first given was according to law. For any Court may err, else errors in judgment would not be admitted, nor a reversal of them. Therefore, if a Judge conceives a judgment given in another Court to be erroneous, he being sworn to judge according to law, that is, in his own conscience ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wrong'd before, much less to follow extra-judicial opinions, unless he believes those opinions are right.

[19] Ia turut dinyatakan oleh Lord Mansfield dalam kes *Jones v Randall and another* (1774) 98 ER 954; (1774) 1 Cowp 37 seperti berikut:

> ... the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the eases according as the particular circumstances of each have been found to fall within the one or other of them.

[20] Seterusnya dalam kes *Mirehouse v Rennell* (1833) 6 ER 1015 Baron Parke telah menjelaskan tanggungjawab mahkamah berkenaan dengan duluan kehakiman seperti berikut:

> Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

[21] Perbincangan berkenaan dengan duluan kehakiman tidak sempurna sekiranya tidak disentuh keputusan dalam kes *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 apabila Lord Greene Mr telah memberi garis panduan berkenaan dengan tatacara untuk menangani duluan kehakiman seperti berikut:

> On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize: (1.) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam.

[22] Oleh itu keputusan Mahkamah Agong dalam kes *Public Prosecutor v Leong Ying Ming* berkenaan dengan s 41B ADB 1952 bersama-sama dengan dengan kes *Public Prosecutor v Chew Siew Luan* adalah mengikat mahkamah bawahan. Walau apapun pandangan mahkamah terhadap keputusan tersebut ia masih perlu dipatuhi dan diikuti oleh mahkamah bawahan. Dalam hal ini pandangan Mahkamah Persekutuan dalam kes *Metramac Corp Sdn Bhd*

(formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177 wajar menjadi suluh panduan: A

> [21] Gopal Sri Ram JCA is therefore correct in saying that *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1; [2000] 3 CLJ 769 and *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65; [2000] 4 CLJ 1 were wrongly decided. Unfortunately he is not the right authority permitted by law to express such an opinion. As both cases are judgments of the Federal Court he is bound to follow them whether he agrees with them or not. The stand taken by him is in blatant disregard of the doctrine of stare decisis particularly when the need to comply with this fundamental rule of the common law was brought to his attention by James Foong JCA in his separate judgment. In order to appreciate the importance of adhering to the doctrine of stare decisis useful references may be made to *Cassell & Co Ltd v Broome* [1972] AC 1027 where Lord Hailsham said at p 809: B C
>
> > The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said: D E
> >
> > > Their lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. F

[23] Ia juga turut dinyatakan oleh Mahkamah Rayuan dalam kes *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 yang menyatakan bahawa adalah menjadi disiplin kehakiman yang penting untuk mahkamah bawahan mengikuti keputusan mahkamah atasan seperti berikut: G

> We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of stare decisis. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein. H I

[24] Begitu juga Mahkamah Persekutuan dalam kes *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; [2006] 1 CLJ 577 menegaskan berkenaan dengan kepentingan mahkamah bawahan untuk mematuhi dan mengikuti

keputusan mahkamah atasan seperti berikut:

> [3] Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system ...

Dan juga menyatakan seperti berikut:

> [4] The observation is but a stark reminder to judges of the importance of adhering to the doctrine. That observation, although made in the context of a peculiar factual setting, is, in my view, equally applicable to the particular situation in the instant case where the Court of Appeal has refused, for insufficient reasons, to follow and apply the 'real danger of bias' test for recusal enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang* and *Mohamed Ezam*. Until such time when the Federal Court holds otherwise, this test must remain entrenched and binding on all inferior courts including the Court of Appeal. Certainty in the law must prevail.

[25] Berdasarkan kepada duluan kehakiman di atas adalah jelas dan nyata bahawa keputusan berkenaan s 41B ADB 1952 perlu dipatuhi dan diikuti oleh mahkamah bawahan. Pandangan peribadi berkenaan dengan s 41B ADB 1952 tersebut tidak boleh mengaburi prinsip duluan kehakiman yang sudah menjadi sebahagian daripada tonggak sistem kehakiman. Oleh yang demikian adalah menjadi tanggungjawab hakim mahkamah bawahan sentiasa mengikuti keputusan-keputusan mahkamah atasan serta tidak membelakangkan keputusan mahkamah atasan.

[26] Selain daripada itu jika diteliti kes *Public Prosecutor v Leong Ying Ming* tersebut ia adalah melibatkan kesalahan di bawah s 12(2) ADB 1952 yang boleh dihukum di bawah s 39A(2) Akta yang sama. Hujahan yang dikemukakan oleh pihak responden ialah terdapat perbezaan di antara s 39A(2) ADB 1952 dengan s 39C. Ini adalah disebabkan s 39C ADB 1952 adalah merupakan peruntukan peningkatan hukuman atau hukuman yang lebih berat dan bukannya satu kesalahan. Ini adalah disebabkan kesalahan sebenarnya di bawah s 15(1) ADB 1952.

[27] Bagi menjawab persoalan ini wajar sekiranya mahkamah merujuk kepada s 39C ADB 1952 dan membandingkannya dengan peruntukan di bawah s 39A(2) Akta yang sama bagi melihat sama ada hujahan oleh peguam responden boleh dipertimbangkan oleh mahkamah. Seksyen 39C ADB 1952 adalah seperti berikut:

> 39C Increased penalty where person has prior admissions or convictions
>
> (1) Where a person who has not less than —
>
> (a) two previous admissions;

(b) two previous convictions under paragraph 10(2)(b) or paragraph 15(1)(a) or any combination of the sections;

(c) one previous admission and one previous conviction under paragraph 10(2)(b) or paragraph 15(1)(a);

(d) one previous admission and two previous convictions under section 31A; or

(e) one previous conviction under paragraph 10(2)(b) or paragraph 15(1)(a) and two previous convictions under section 31A,

is found guilty of an offence under paragraph 10(2)(b), paragraph 15(1)(a) or section 31A, he shall, instead of being liable to the punishment provided for that offence under the section under which he has been found guilty, be punished with imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes.

(2) Where a person who has been punished under subsection (1) is convicted of a subsequent offence under paragraph 10(2)(b), paragraph 15(1)(a) or section 31A, he shall, instead of being liable to the punishment provided for that offence under the section under which he has been found guilty, be punished with imprisonment for a term which shall not be less than seven years but shall not exceed thirteen years, and he shall also be punished with whipping of not less than three strokes but not more than six strokes.

(3) A certificate to be signed by an officer authorized in writing by the Director General and purporting to relate to a person's admission to a Rehabilitation Centre shall be admissible in evidence in any proceedings under this section, on its production by the prosecution without proof of signature; and, until the contrary is proved, that certificate shall be evidence of all matters contained in the certificate.

(4) For the purposes of this section —

'admission' means an admission to undergo treatment and rehabilitation at a Rehabilitation Centre by an order of a magistrate under paragraph 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983;

'Director General' means the Director General appointed under subsection 2(2) of the Drug Dependants (Treatment and Rehabilitation) Act 1983;

'Rehabilitation Centre' means the Rehabilitation Centre established under section 10 of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

[28] Sementara itu s 39A ADB 1952 menyatakan seperti berikut:

39A Increased penalty where the subject matter is the prescribed amount to certain dangerous drugs

(1) Every person found guilty of an offence against this Act where the subject matter of the offence is —

(a) *2 grammes or more but less than 5 grammes in weight of heroin;*

(b) ...;
(c) ...;
(d) ...;
(e) ...;
(f) ...;
(g) ...;
(h) ...;
(i) ...;
(j) ...;
(k) ...;
(l) ...;
(m) ...;
(n) ...;
(o) ...;
(p) ...;
(q) ...;
(r) ...;
(s) ...;
(t) ...;
(u) ...;
(v) ...;
(w) ...;
(x) ...;
(y) ...;
(z) ...; *or*
(aa) ...

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for a term which shall not be less than two years but shall not exceed five years, and he shall also be punished with whipping of not less than three strokes but not more than nine strokes.

(2) Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is —

(a) 5 grammes or more in weight of heroin;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(g) ...;

(h) ...;

(i) ...;

(j) ...;

(k) ...;

(l) ...;

(m) ...;

(n) ...;

(o) ...;

(p) ...;

(q) ...;

(r) ...;

(s) ...;

(t) ...;

(u) ...;

(v) ...;

(w) ...;

(x) ...;

(y) ...; *or*

(z) ...;

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

[29] Penelitian kepada s 39A(2) dan s 39C ADB 1952 tersebut adalah jelas menunjukkan ia memperuntukkan hukuman lebih berat bagi keadaan di mana telah diperuntukkan di bawah kesalahan tersebut bagi pertimbangan

hukuman yang lebih berat. Ini bermakna s 39A dan 39C ADB 1952 bukannya kesalahan tetapi adalah peruntukan hukuman. Ini bermakna pertimbangan dalam kes *Public Prosecutor v Leong Ying Ming* tersebut adalah sama dengan kedudukan dalam kes ini yang menyebabkan mahkamah ini terikat dengan keputusan Mahkamah Agong tersebut.

[30] Oleh yang demikian adalah dengan rasa tawaduk dan rendah diri serta hormat mahkamah ini tidak dapat bersetuju dengan keputusan dalam kes *Murugan* tersebut dan mahkamah ini terikat dengan prinsip duluan kehakiman serta perlu mematuhi keputusan Mahkamah Persekutuan yang telah menjelaskan pemakaian s 41B ADB 1952 dan hubung kaitnya dengan s 388 KTJ.

[31] Di samping itu juga hujahan yang menyatakan bahawa pada masa penggubalan s 41B ADB 1952, s 39C masih belum wujud adalah tidak dapat disokong. Ini adalah disebabkan sebarang pindaan terhadap undang-undang yang menyentuh kepada sesuatu hukuman pada hemat Mahkamah ini tidak wajar menyebabkan berlakunya perubahan kepada kedudukan undang-undang berkaitan dengan kategori kesalahan tersebut sama ada ia adalah boleh jamin (*bailable*), tidak boleh dijamin (*non-bailable*) dan tidak boleh dijamin sama sekali (*unbailable*).

[32] Ini adalah disebabkan pada hemat mahkamah adalah menjadi bidang kuasa pihak penggubal undang-undang untuk menentukan kesalahan-kesalahan yang tergolong di dalam kategori boleh jamin (*bailable*), tidak boleh jamin (*non-bailable*) atau tidak boleh dijamin sama sekali (*unbailable*) seperti yang diperuntukkan di bawah undang-undang bertulis. Mahkamah tidak sewajarnya membuat takrifan yang diluar daripada kerangka undang-undang tersebut seperti apa yang ditegaskan oleh Mahkamah Persekutuan dalam kes *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* seperti berikut:

> The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it ... Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacker & Sons Ltd v London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; [1986] CLJU 79; [1986] 1 LNS 79) ...

[33] Selain daripada itu pada hemat mahkamah penentuan sama ada sesuatu kesalahan tersebut adalah boleh jamin (*bailable*), tidak boleh jamin (*non-baliable*) atau tidak boleh dijamin sama sekali (*unbailable*) telah diperturunkan di dalam Jadual Pertama Kanun Tatacara Jenayah yang telah menjelaskan berkenaannya yang menghubungkaitkan hukuman yang boleh

dikenakan dengan jaminan. Misalnya seperti berikut:

OFFENCES AGAINST LAWS OTHER THAN THE PENAL CODE

If punishable with death or imprisonment for seven years or upwards	May arrest without warrant	Warrant	Not bail-able	Not compound-able
If punishable with imprisonment for three years and upwards, but less than seven years	do.	do.	do.	do.
If punishable with imprisonment for less than three years	Shall not arrest without warrant	Summons	Bailable	do.
If punishable with fine only		do.	do.	

[34] Begitu juga sekiranya undang-undang memperuntukkan bahawa sesuatu kesalahan itu tidak boleh dijamin sama sekali (*unbailable*) ia akan dinyatakan di bawah undang-undang bertulis dan mahkamah yang mengendalikan kes tidak mempunyai budi bicara untuk memberikan jaminan kepada seseorang yang dituduh di bawah kesalahan yang tidak boleh dijamin sama sekali (*unbailable*). Jika ini dilakukan ia adalah satu kesilapan undang-undang yang perlu diperbetulkan.

[35] Akhirnya, mahkamah berpendapat bahawa keputusan hakim mahkamah sesyen memberikan jaminan kepada responden adalah menyalahi s 41B ADB 1952 dan bertentangan dengan keputusan Mahkamah Agong dan Mahkamah Persekutuan seperti dalam kes *Public Prosecutor v Leong Ying Ming* dan *Public Prosecutor v Chew Siew Luan*. Ini adalah bertentangan dengan prinsip duluan kehakiman. Oleh yang demikian ia adalah tidak sah di sisi undang-undang. Oleh itu mahkamah ini menggunakan budi bicara semakan dan mengenepikan perintah hakim mahkamah sesyen tersebut.

Perintah HMS diketepikan.

Dilaporkan oleh Dzulqarnain Ab Fatar